

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

DIRECTV, LLC; AT&T Services, Inc.,

Complainants,

v.

Deerfield Media, Inc.; Deerfield Media (Port
Arthur) Licensee, LLC; Deerfield Media
(Cincinnati) Licensee, LLC; Deerfield Media
(Mobile) Licensee, LLC; Deerfield Media
(Rochester) Licensee, LLC; Deerfield Media (San
Antonio) Licensee, LLC; GoCom Media of
Illinois, LLC; Howard Stirk Holdings, LLC; HSH
Flint (WEYI) Licensee, LLC; HSH Myrtle Beach
(WWMB) Licensee, LLC; Mercury Broadcasting
Company, Inc.; MPS Media of Tennessee
Licensee, LLC; MPS Media of Gainesville
Licensee, LLC; MPS Media of Tallahassee
Licensee, LLC; MPS Media of Scranton Licensee,
LLC; Nashville License Holdings, LLC; KMTR
Television, LLC; Second Generation of Iowa,
LTD; Waitt Broadcasting, Inc.,

Defendants.

MB Docket No. 19-168
CSR-8979-C

DEFENDANTS' ANSWER TO GOOD FAITH COMPLAINT

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(Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC (“Deerfield Mobile”);
Deerfield Media (Rochester) Licensee, LLC; and Deerfield Media (San Antonio) Licensee, LLC
(collectively, the “Deerfield entities”); Howard Stirk Holdings, LLC; HSH Flint (WEYI)
Licensee, LLC; and HSH Myrtle Beach (WWMB) Licensee, LLC (collectively, the “HSH
entities”); GoCom Media of Illinois, LLC (“GoCom”); Mercury Broadcasting Company, Inc.

(“Mercury”); MPS Media of Tennessee Licensee, LLC; MPS Media of Gainesville Licensee, LLC; MPS Media of Tallahassee Licensee, LLC; and MPS Media of Scranton Licensee, LLC (collectively, the “MPS entities”); Nashville License Holdings, LLC (“Nashville License Holdings”); KMTR Television, LLC (“Roberts”); Second Generation of Iowa, LTD (“Second Generation”); and Waitt Broadcasting, Inc. (“Waitt”) (collectively, “Defendants”), by counsel and pursuant to Section 76.7(b)(2) of the Commission’s rules, hereby provide their answer (“Answer”) to the good faith complaint (“Complaint”) filed by DIRECTV, LLC (“DIRECTV”) and AT&T Services, Inc. (“AT&T”) (collectively, “Complainants”) on July 17, 2019.¹

I. INTRODUCTION AND SUMMARY

The Complaint asserts that Defendants violated their obligations to negotiate in good faith by [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL] [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

¹ See Verified Complaint of DIRECTV, LLC and AT&T Services, Inc. for the Station Groups’ Failure to Negotiate in Good Faith, MB Docket No. 12-1 (filed July 17, 2019) (“Compl.”). Complainants commenced this proceeding by filing two redacted copies of the Complaint with the Commission and serving Defendants with redacted copies of the same on June 18, 2019. See Verified Complaint of DIRECTV, LLC and AT&T Services, Inc. for the Station Groups’ Failure to Negotiate in Good Faith, MB Docket No. 12-1 (filed June 18, 2019). In connection with its adoption of a Protective Order in this proceeding, the Commission granted Defendants’ request to provide their Answer 20 days following receipt of unredacted copies of the Complaint and any confidential materials in support thereof, which occurred on July 17, 2019. See Email from Lyle Elder, FCC, to Outside Counsel for the Parties, MB Docket No. 19-168 (filed July 9, 2019); Petition for Limited Waiver and Extension of Time to Answer Good Faith Complaint from DIRECTV and AT&T, MB Docket No. 12-1 (filed June 26, 2019); see also 47 C.F.R. § 76.7(b)(2)(ii) (providing that answers to good faith complaints must be filed within 20 days of service of the complaint).

[REDACTED] [END

CONFIDENTIAL].² Complainants do not allege, however, that Defendants violated the Commission rule specifically governing joint negotiations, which prohibits only joint negotiations among independent broadcasters “in the same local market.”³

The Complaint’s attempt to manufacture a regulatory violation out of Defendants’ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] is a scarcely clothed effort to achieve through an adjudicatory proceeding the type of blanket prohibition on joint negotiations that Complainants have been unable to achieve through the rulemaking process or their extensive lobbying efforts in Congress. The Complaint is a waste of Commission resources and should be promptly denied with prejudice.

Indeed, if Complainants truly believed that Defendants had violated their good faith obligation in renegotiating RTC agreements [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] they should have brought this Complaint within one year of Complainants and Defendants consensually following this exact same process in 2016 [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].

Complainants did not file a complaint with the Commission following the initial RTC negotiation in 2016 for the simple reason that nothing in the 2016 RTC negotiation process

² Compl. ¶ 4.

³ 47 C.F.R. § 76.65(b)(1)(viii).

violated Defendants' duty to negotiate in good faith. The same is true now.

Under the Commission's rules, Complainants bear the burden of proving that Defendants violated their obligations to negotiate in good faith.⁴ To carry that burden, they must establish either that Defendants engaged in specified "actions or practices" that constitute bad faith *per se* or that the "totality of the circumstances" warrant a finding of bad faith.⁵ Complainants have failed to establish either basis for a bad faith finding.

First, the conduct challenged by Complainants — [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] — is not and never has been a *per se* violation of the good faith obligation. Defendants are fully within their rights to [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL], something that Complainants not only admit in their Complaint but also acknowledged through their own consensual course of dealing in 2019 [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] which were conducted [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]. In fact, even after filing their Complaint, Complainants have continued to acknowledge and engage with Max Retrans as common agent for Defendants.

To be sure, the Commission has considered rulemaking proposals — including in 2011 and 2015 — that would have prohibited joint negotiations among broadcasters altogether.

⁴ See *id.* § 76.65(d); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, 5483 (¶ 89) (2000) ("*Good Faith Order*").

⁵ 47 C.F.R. § 76.65(b)(1)–(2); see also *Good Faith Order* at 5457–58 (¶¶ 30–32).

Complainants enthusiastically supported those proposals, but the Commission decided on a narrower approach and prohibited only joint negotiations among broadcasters in the same local market. Having failed twice to get their desired prohibition adopted by the Commission, Complainants cannot reasonably argue that the prohibition exists anyway on the theory that a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] is somehow the same as a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

Second, having failed to prove any *per se* violation of the Commission’s rules, Complainants advance a host of uncorroborated and irrelevant grievances against third parties in a desperate effort to satisfy the “totality of the circumstances” test. None of these allegations changes the basic fact that the Commission has declined to prohibit joint negotiations among broadcast stations in different geographic markets, or supports an interpretation of the “totality of the circumstances” test that would achieve the same prohibition by different means.

Despite having continued to engage with Max Retrans after filing their Complaint, for example, Complainants ask the Commission to accept as fact that Max Retrans has violated its obligations under the non-disclosure agreement (“NDA”) that it signed with Complainants in 2016. The Commission is not the proper forum to decide a breach of contract claim, let alone a breach of contract claim against an entity that is not even a party to the administrative proceeding. After filing the Complaint, Complainants attempted to cure this flaw by bringing suit directly against Max Retrans in federal court.⁸ But that does not cure the infirmity in this

⁶ Compl. ¶ 4.

⁷ *Id.* ¶ 6.

⁸ See Civil Complaint, *AT&T Services, Inc. & DIRECTV, LLC v. Max Retrans LLC*, No. 19-01925 (E.D. Mo. July 11, 2019).

proceeding that the Complaint's primary allegations under the totality of the circumstances test are against Max Retrans, which is not a party and is unable to defend itself. Those allegations provide no basis for finding a good faith violation by Defendants under the totality of the circumstances test, and further risk potentially inconsistent and conflicting decisions between the Commission and the U.S. District Court for the Eastern District of Missouri.

Complainants similarly bring additional allegations against a third party also not named as a defendant, Sinclair Broadcast Group ("Sinclair"), without seeking any relief or Commission action related to those allegations. This suggests that those allegations are simply designed to attract media attention for the Complaint. In any event, the totality of the *actual* circumstances relevant to this proceeding demonstrates that Defendants have acted in good faith through the entire course of the joint negotiations dating back to 2016, even after the expiration of Defendants' RTC agreements with Complainants.

Nonetheless, Complainants' objective in bringing this proceeding is obvious: seek government intervention in private negotiations to divide and conquer small, secondary market stations by forcing them to negotiate separately and lose their skillful private negotiator. Even though Complainants are now the largest MVPD in the country,⁹ they apparently believe that their negotiating position would be improved by a Commission order declaring joint RTC negotiations off-limits for broadcast stations. But it is absurd on its face that Complainants need the government's help in private negotiations with nine small broadcast station groups.

⁹ See Ben Munson, *The Top 6 Cable, Satellite and Telco Pay TV Operators in the First Quarter of 2019: Ranking Comcast, DirecTV, Charter and More*, FierceVideo (May 7, 2019, 10:02 AM), <https://www.fiercevideo.com/cable/top-6-cable-satellite-and-telco-pay-tv-operators-q1-2019-ranking-comcast-directv-charter-and>.

Meanwhile, in just the *past month alone*, Complainants have leveraged their market power to force the blackout of 120 Nexstar stations in 97 markets¹⁰ and the loss of CBS programming for 6.5 million customers.¹¹ This is apparently part of a broader strategy by Complainants to isolate broadcasters and manufacture controversy while they lobby Congress to renew STELAR on more favorable terms.¹² Even Defendants’ reasonable request last month to temporarily resume carriage of one of their station’s signals for the benefit of area viewers during then-impending Hurricane Barry in Mobile, Alabama and Pensacola, Florida, which was made without prejudice to Complainants’ rights in this proceeding, was ignored with callous disregard for the risks to life and property.

The Commission should not condone Complainants’ manipulative tactics, let alone “dictate the outcome of . . . marketplace negotiations” by depriving a handful of small station groups of a critical tool in their RTC negotiations with the nation’s largest MVPD.¹³ Complainants have not met — and cannot meet — their burden of proving a violation of the good faith negotiation requirement, and the Complaint should accordingly be denied.

II. STATEMENT OF FACTS

The RTC agreements that are the subject of this good faith proceeding date back to 2016. Because the Complaint declines to address the 2016 negotiations and agreements — and because the negotiating process that Defendants used in 2019 follows the same approach that they and

¹⁰ See Mike Farrell, *More Than 120 Nexstar Stations Dark on DirecTV*, Multichannel (July 5, 2019), <https://www.multichannel.com/news/more-than-120-nexstar-stations-dark-on-directv>.

¹¹ See Edmund Lee, *CBS Is Blacked Out for 6.5 Million AT&T Customers. Here’s Why*, N.Y. Times (July 20, 2019), <https://www.nytimes.com/2019/07/20/business/media/cbs-blackout-att.html>.

¹² See Press Release, National Association of Broadcasters, Gordon Smith Speech at Media Institute Communications Forum Luncheon (July 23, 2019), <https://www.nab.org/documents/newsroom/pressRelease.asp?id=5081> (“Smith Speech”).

¹³ S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169.

Complainants used in 2016 — this Answer will discuss the 2016 negotiations and agreements in detail.

A. The 2016 RTC Negotiations and Agreements

In November 2016, Defendants [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] retained Max Retrans to serve as their common agent in negotiations with Complainants for carriage of their stations.¹⁴ Complainants initially resisted Max Retrans's joint representation of Defendants [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL],¹⁵ but ultimately agreed to work with Max Retrans as Defendants' [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] common agent. In the NDA that they signed with Max Retrans, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL].¹⁶ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

¹⁴ Declaration of Duane Lammers ("Lammers Decl.").

¹⁵ *Id.*

¹⁶ ATT000884–ATT000846.

¹⁷ *See* Ex. 1.

¹⁸ *Id.*

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END

HIGHLY CONFIDENTIAL].²³ Among other things, the agreements granted Complainants the right to carry the stations' signals until **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]**.²⁴

B. The 2019 RTC Negotiations

In early 2019, Complainants and Defendants again commenced discussions, this time concerning the renewal of the parties' RTC agreements.²⁵ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] notified Complainants that Max Retrans would again serve as Defendants' common agent for purposes of negotiating the renewals [BEGIN HIGHLY

¹⁹ *Id.*

²⁰ Ex. 2.

²¹ Ex. 3.

²² Ex. 4.

²³ ATT000847–ATT001151.

²⁴ *Id.*

²⁵ Lammers Decl.

CONFIDENTIAL]

[REDACTED] [END HIGHLY CONFIDENTIAL] representing (the “Joint Party List”), which included, among others, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Defendants.²⁶

Between March 4 and March 15, 2019, Complainants' negotiators sent to Mr. Lammers and Max Retrans separate proposed renewal agreements [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] for each Defendant.²⁷ On March 27, Ms. Burakoff asked when she could expect a response to [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL].²⁸ Consistent with Max Retrans serving as the common agent for Defendants [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL], Mr. Lammers responded on March 28, advising Ms. Burakoff that he could agree to [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL].²⁹ [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END

CONFIDENTIAL].³⁰ By agreeing to [BEGIN CONFIDENTIAL] [REDACTED] [END

CONFIDENTIAL], Complainants affirmatively consented to Defendants' joint negotiations.

[BEGIN HIGHLY CONFIDENTIAL]

²⁶ ATT000025, ATT000029.

²⁷ ATT000030, ATT000222.

²⁸ ATT000223.

29 *Id.*

³⁰ See ATT000223–ATT000230.

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL] Ten days later, Julia Hongfeng Dai, another of Complainants’ negotiators, sent an email to Mr. Lammers asking for the status of his review of the Defendant-specific agreement proposals that she was covering.³² Mr. Lammers advised Ms. Dai that a response for the “Joint Parties” had been sent to Ms. Burakoff.³³

On April 19, 2019, negotiators for Complainants sent Mr. Lammers revised drafts of the Defendant-specific agreement proposals.³⁴ Three days later, following Mr. Lammers’s conversations with Complainants,³⁵ Complainants’ negotiators sent Mr. Lammers emails [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL].³⁶ Thus, as they had in March, Complainants again affirmatively consented to joint negotiations for Defendants in April.

On April 25, 2019, Mr. Lammers sent Complainants a mark-up of their draft renewal agreement [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL], [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] noting that the response was provided on behalf of the “Joint Parties,” and attaching the Joint Party List.³⁷ On May 7, Complainants sent Mr. Lammers a revised draft of the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

³¹ ATT000231.

³² ATT000253–ATT000254.

³³ *Id.*

³⁴ *See* ATT000255–ATT000394.

³⁵ Lammers Decl.

³⁶ *See* ATT000395–ATT000417.

³⁷ ATT000553–ATT000576.

proposal.³⁸ The next day, Mr. Lammers [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END
CONFIDENTIAL].³⁹ On May 10, Mr. Lammers sent Complainants a mark-up of the [BEGIN
CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL].⁴⁰ Complainants eventually agreed [BEGIN
CONFIDENTIAL] [REDACTED]
[END CONFIDENTIAL].⁴¹ By [BEGIN CONFIDENTIAL] [REDACTED] [END
CONFIDENTIAL], Complainants yet again affirmatively consented to Defendants' joint
negotiations.

On May 17, 2019, one of Complainants' negotiators sent Mr. Lammers a revised draft of
the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] proposal.⁴² That
same day, negotiators for Complainants sent Mr. Lammers emails inquiring about the status of
his review of certain of the Defendant-specific drafts that had been previously circulated.⁴³ Mr.
Lammers again advised that he was representing Defendants jointly.⁴⁴ On May 20,
Complainants proposed, and Defendants agreed to, [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL].⁴⁵ For a

³⁸ ATT000582–ATT000583.

³⁹ ATT000582. Notwithstanding the fact that Defendants' outside counsel properly requested and were granted authority to access to the Highly Confidential documents submitted by Complainants in this proceeding (including the documents on which the Complaint relies for support), the remainder of the communications in the email chain between Mr. Lammers and Defendants [BEGIN CONFIDENTIAL] [REDACTED] [END
CONFIDENTIAL] remains redacted. *See* ATT000581–ATT000582.

⁴⁰ ATT000604–ATT000628.

⁴¹ *See* ATT000585–ATT000591, ATT000629–ATT000648.

⁴² ATT000649–ATT000677.

⁴³ ATT000678–ATT000704.

⁴⁴ ATT000704.

⁴⁵ ATT000706.

fourth time, therefore, Complainants affirmatively consented to the Defendants' joint negotiations.

Notwithstanding Max Retrans's diligent negotiations on behalf of Defendants and meaningful engagement with Complainants, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END

CONFIDENTIAL].⁴⁶ Three days later, Max Retrans [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL].⁴⁷

Despite these unsubstantiated broadsides from Complainants, Max Retrans continued to engage with them in good faith on a joint basis. On May 29, 2019, Mr. Lammers [BEGIN

CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [END

HIGHLY CONFIDENTIAL].

⁴⁶ ATT000707–ATT000708.

⁴⁷ ATT000709–ATT000713.

⁴⁸ ATT000714–ATT000716, ATT000723–ATT000724, ATT000727.

⁴⁹ See ATT000720–ATT000733, ATT000735–ATT000739, ATT000741–ATT000751, ATT000755.

⁵⁰ Ex. 5.

⁵¹ ATT000734, ATT000754, ATT000756.

On May 31, Mr. Lammers sent Complainants a mark-up of the [BEGIN
CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] agreement, which again contained
revisions to various [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END
HIGHLY CONFIDENTIAL].⁵² As a further showing of good faith and willingness to
cooperate, Mr. Lammers also sent Complainants clean revised drafts of each of their Defendant-
specific renewal agreement proposals, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL].⁵³ Rather than engage cooperatively with Max
Retrans, however, Complainants falsely claimed that Defendants' responses were [BEGIN
HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and insisted
that Max Retrans run redlines against their prior drafts.⁵⁴ [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL].⁵⁵

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

⁵² ATT000758–ATT000782.

⁵³ ATT000783–ATT000794, ATT000796–ATT000810.

⁵⁴ See ATT000795, ATT000811–ATT000822, ATT000837.

⁵⁵ ATT000833–ATT000834.

⁵⁶ ATT000836–ATT000837; Declaration of Armstrong Williams.

⁵⁷ ATT000835.

[REDACTED]

[REDACTED] [END HIGHLY

CONFIDENTIAL].⁵⁸

Even after Complainants filed the Complaint, Defendants have continued to engage in good-faith discussions with Complainants concerning the potential carriage of their stations.⁵⁹ However, Complainants remain unwilling to deal fairly with Defendants, all while continuing to concede that Max Retrans properly serves as Defendants' common agent. [BEGIN HIGHLY

CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]. In addition, on July 16, after the filing of the

Complaint, Mr. Lammers reached out to Dallia Kim, a negotiator for Complainants, to see if she had any suggestions for how the parties could work to restore carriage of Defendants' stations on

⁵⁸ Ex. 6.

⁵⁹ Lammers Decl.

⁶⁰ Ex. 7.

⁶¹ *Id.*

⁶² *Id.*

Complainants' systems following the expiration of the 2016 agreements.⁶³ In continued recognition of Max Retrans's role as Defendants' common agent, Ms. Kim responded by saying

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

During the same period, Complainants were also engaged with other parties utilizing a common agent and the joint negotiation approach. In February 2019, non-defendant licensees Deerfield Media (Reno) Licensee, LLC ("Deerfield Reno"), Deerfield Media (Baltimore) Licensee, LLC ("Deerfield Baltimore"), and Manhan Media, Inc. ("Manhan") retained the services of a common agent with respect to their RTC negotiations with Complainants.⁶⁵

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].⁶⁶ Thus, Complainants consented to joint

negotiations with a party other than Max Retrans and certain Defendant-affiliated stations

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].

III. DISCUSSION

Under the Commission's regulations, "the burden of proof as to the existence of a [good-faith] violation shall be on the complainant[s]."⁶⁷ To carry this burden, Complainants must establish either that Defendants engaged in one of nine enumerated actions that constitute a *per*

⁶³ Ex. 8.

⁶⁴ *Id.* (emphasis added).

⁶⁵ Declaration of Stephen P. Mumblow ("Mumblow Decl.").

⁶⁶ *Id.*

⁶⁷ 47 C.F.R. § 76.65(d).

se violation of the good-faith-negotiation rules,⁶⁸ or that Defendants breached their duty to negotiate in good faith “based on the totality of the circumstances of [the] particular retransmission consent negotiation[s].”⁶⁹ In this proceeding, however, Complainants have failed to establish a violation under either standard. To the contrary, Defendants have repeatedly engaged in good faith negotiations with Complainants. Complainants protest that Defendants jointly engaged in those negotiations, but they cannot fault Defendants’ decision to negotiate jointly given the Commission’s determination to permit joint negotiations where (as here) the relevant stations or station groups operate in different markets.

A. Complainants Have Not Established a *Per Se* Violation of the Good-Faith-Negotiation Requirement.

The Commission has identified nine “actions or practices” that “violate a broadcast television station’s or multichannel video programming distributor’s (the ‘Negotiating Entity’) duty to negotiate retransmission consent agreements in good faith” as a matter of law.⁷⁰ These include “[r]efusal by a Negotiating Entity to negotiate retransmission consent”,⁷¹ “[r]efusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations”,⁷² and “[f]ailure of a Negotiating Entity to respond to a retransmission consent proposal of the other party.”⁷³ Although Complainants refer to each of these *per se* violations,⁷⁴ they have neither pleaded nor proven that Defendants committed them.

⁶⁸ See *id.* § 76.65(b)(1); see also, e.g., *Good Faith Order*, 15 FCC Rcd. at 5462–64 (¶¶ 40–46).

⁶⁹ 47 C.F.R. § 76.65(b)(2); see also *Good Faith Order*, 15 FCC Rcd. at 5458 (¶ 32).

⁷⁰ 47 C.F.R. § 76.65(b)(1).

⁷¹ *Id.* § 76.65(b)(1)(i).

⁷² *Id.* § 76.65(b)(1)(iii).

⁷³ *Id.* § 76.65(b)(1)(v).

⁷⁴ See Compl. ¶ 5.

Indeed, the Complaint focuses predominately on a separate issue — joint negotiation among broadcasters in different geographic markets — that the Commission has repeatedly declined to make a *per se* violation. Complainants do not allege that Defendants violated 47 C.F.R. § 76.65(b)(1)(viii), the only *per se* violation that addresses joint negotiations, presumably because Defendants are not in the same local market and thus cannot violate that provision.⁷⁵ Outside of that narrow prohibition, however, joint negotiations are commonplace in the television industry, even among MVPDs.⁷⁶ Complainants cannot properly transform Defendants’ reliance on a common and permissible method of negotiation into a violation of the Commission’s rules.

1. The Complaint Demonstrates that Defendants Negotiated with Complainants Rather Than Refused To Negotiate with Them.

Complainants face difficulties at the outset given their acknowledgment that [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL]⁷⁸ They attempt to overcome these difficulties by characterizing Defendants’ desire to negotiate jointly as a [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]⁷⁹ But the Complaint’s own allegations, as well as the relevant documentary evidence, foreclose these theories: Through their common agent, Max Retrans, Defendants engaged in substantive, timely,

⁷⁵ *Id.* ¶¶ 52–65; *see also id.* ¶ 2 (listing markets without overlap between or among Defendants).

⁷⁶ *See, e.g.,* Patrick Hipes, *Viacom Renews Carriage Deal with NCTC Operators*, Deadline (July 30, 2019, 8:34 AM), <https://deadline.com/2019/07/viacom-nctc-new-carriage-agreement-1202656997> (reporting on the renewal of a distribution agreement between Viacom and the National Cable Television Cooperative, which negotiated on behalf of its 750 member cable operators).

⁷⁷ Compl. Statement of Facts, Part E (capitalization omitted and emphasis added).

⁷⁸ *Id.* ¶ 75 (emphasis added).

⁷⁹ *Id.* ¶ 6.

and ongoing negotiations with Complainants over several months concerning ongoing carriage of Defendants' stations. What Complainants are truly protesting is *how* Max Retrans engaged with them — namely, acting as a common agent for Defendants in a way that apparently has reduced Complainants' expected leverage over Defendants. But that joint representation was consistent with the way Max Retrans had jointly represented Defendants in their 2016 negotiations with Complainants, which had successfully resulted in RTC agreements. And so long as that joint conduct does not run afoul of the Commission's rules, the Commission simply does not dictate how private parties in RTC negotiations carry out their negotiations.

Complainants freely acknowledge that Defendants are represented by a joint agent,⁸⁰

[BEGIN CONFIDENTIAL]

[END]

CONFIDENTIAL],⁸¹ that Complainants first sent their renewal proposals to Defendants via their joint agent,⁸² and that Complainants repeatedly agreed to [BEGIN CONFIDENTIAL]

[END]

CONFIDENTIAL].⁸³ Further, Complainants do not and cannot deny that the same conduct that they suddenly found objectionable in 2019 was how the RTC agreements were originally jointly negotiated between Max Retrans and Complainants in 2016. Yet despite repeatedly ratifying and engaging in this joint negotiation process in 2016, and then again over the course of several months in 2019, Complainants now assert that by negotiating jointly, Defendants were instead “jointly” refusing to negotiate on an individual basis.⁸⁴ That assertion is false and a direct assault

⁸⁰ *Id.* ¶ 30.

⁸¹ *Id.* ¶ 29.

⁸² *Id.* ¶ 30.

⁸³ *Id.* ¶¶ 35, 47.

⁸⁴ *Id.* ¶ 6.

on the permissible use of joint negotiations, which the Commission has repeatedly declined to prohibit.

Complainants' own conduct following the filing of their Complaint confirms these conclusions. Complainants' willingness on July 16, 2019 to work with Max Retrans to negotiate agreements for the Deerfield entities, GoCom, and Roberts reveals the hollowness of their purported opposition to Max Retrans serving as Defendants' common agent in the first place. Complainants cannot reasonably argue that Defendants should be compelled to forego use of a common agent in order to satisfy their good faith negotiation obligation having worked repeatedly with that common agent both before and after filing their Complaint.⁸⁵

Complainants' contentions also fly in the face of their own course of dealing in the prior RTC negotiations. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].⁸⁶

Complainants have also entered into agreements for carriage of [BEGIN HIGHLY

CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL] which were similarly represented by a common agent

(albeit not Max Retrans).⁸⁷ Most recently, Complainants' deal with [BEGIN HIGHLY

CONFIDENTIAL] [REDACTED]

[REDACTED]

[END HIGHLY CONFIDENTIAL]

Complainants have refused to deal fairly in connection with potential carriage of Defendants'

⁸⁵ See *Id.* ¶ 9.

⁸⁶ See Ex. 1.

⁸⁷ Mumblow Decl.

stations.⁸⁸ Complainants have failed to articulate why the use of a common agent in those negotiations was repeatedly acceptable, but the use of Max Retrans suddenly became objectionable in June 2019 in the specific instance of negotiations for carriage of Defendants' stations.

2. The Commission Has Rejected Attempts To Prohibit Joint Negotiations for Retransmission Consent Using a Common Agent.

Complainants are plainly dissatisfied with what they call Defendants' [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]⁸⁹ This argument should not come as a surprise to the Commission: Complainants have repeatedly tried to convince the Commission to prohibit joint negotiations altogether. They have also repeatedly failed in these efforts.

In 2011, in response to a rulemaking petition filed by DIRECTV and other MVPDs, the Commission issued a notice of proposed rulemaking that sought comment on a proposal to “effectively prohibit joint retransmission consent negotiations by stations that are not commonly owned.”⁹⁰ DIRECTV supported the proposed rule.⁹¹ The Commission ultimately rejected the proposal, however, concluding based on “the evidence in this proceeding” that a “more limited approach” was warranted, and “prohibiting outright only television broadcast stations that are ranked among the top four stations as measured by audience share from negotiating

⁸⁸ Lammers Decl.

⁸⁹ Compl. ¶ 4; *see also id.* ¶¶ 6, 30–31, 42, 45, 70, 75.

⁹⁰ *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718, 2731 (¶ 23) (2011).

⁹¹ Comments of DIRECTV, Inc. at 19–20, MB Docket No. 10-71 (filed May 27, 2011); *see also Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, 3355–56 & nn.27, 29 (¶ 7) (2014) (“Retransmission Consent Order”).

retransmission consent jointly with another such station, if the stations are not commonly owned and serve the same geographic market.”⁹²

Congress subsequently directed the Commission to expand the then-in-force geographical limitation on joint negotiations beyond the top four broadcast channels to include any separately owned broadcast stations in the same market.⁹³ In addition to implementing this change,⁹⁴ the Commission again sought comment on whether to prohibit joint negotiations among broadcast stations regardless of their geographic markets.⁹⁵ AT&T urged the Commission to ban joint negotiations, and its submissions criticized — as the complaint does here — “the related and increasingly common practice of multiple broadcasters hiring a handful of common consultants and outside counsel to represent them in negotiations.”⁹⁶ The Commission has declined to make any changes to its existing retransmission consent rules that would prohibit joint negotiations.

Notwithstanding Complainants’ attempts to prohibit the practice, therefore, joint negotiations by stations and station groups in different geographic markets remain permitted by Congress and the Commission.⁹⁷ In this respect, Complainants are trying to get through their Complaint what they repeatedly have failed to get in past rulemakings. The Commission should reject Complainants’ latest effort to prohibit joint negotiation strategies, **[BEGIN HIGHLY**

⁹² Retransmission Consent Order, 29 FCC Rcd. at 3357 (¶ 10).

⁹³ See STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103, 128 Stat. 2059, 2062 (amending 47 U.S.C. § 325(b)(3)(C)).

⁹⁴ See *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd. 2380, 2381 (¶ 4) (2015) (amending 47 C.F.R. § 76.65(b)(1)(viii)).

⁹⁵ *Implementation of Section 103 of the Stela Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd. 10327, 10378–39 (¶ 14), 10344–45 (¶ 20) (2015).

⁹⁶ Comments of AT&T at 23, MB Docket No. 15-216 (filed Dec. 1, 2015); see also Notice of Ex Parte Communication at 3–4, MB Docket Nos. 10-71 & 15-216 (filed Mar. 16, 2016).

⁹⁷ Cf. 47 C.F.R. § 76.65(b)(1)(viii).

CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].

* * *

Given the extensive discussions and exchanges of proposals outlined above, Defendants' course of conduct over the first half of 2019 belies any suggestion of a refusal to negotiate retransmission consent, unreasonable delay in negotiations, or failure to respond to a proposal from Complainants, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].⁹⁸ Indeed, Complainants appear to be the entities acting in bad faith, creating retransmission consent disruptions that they can cynically use to file complaints and potentially alter the STELAR reauthorization process.⁹⁹

B. Complainants Have Not Established a Violation of the Commission's Regulations Under the Totality-of-the-Circumstances Test.

Unable to identify any *per se* violation of the Commission's rules that they could allege in this proceeding, Complainants inevitably resort to the totality-of-the-circumstances test, under

⁹⁸ See *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, Memorandum Opinion and Order, 33 FCC Rcd. 1137, 1140 n.33 (2018) (finding no *per se* violation under 47 C.F.R. § 76.65(b)(1)(i), (v) when "record indicate[d] that there were many back-and-forth communications between the parties, including multiple extension agreements to facilitate negotiations.... Such discussions clearly demonstrate that there was not a complete refusal to negotiate"); *Coastal Tel. Broad. Co. LLC v. MTA Commc'ns, LLC*, Memorandum Opinion and Order, 2018 WL 5816554, at *2 (¶ 8) (Nov. 2, 2018) (Media Bureau) (finding no *per se* violation under 47 C.F.R. § 76.65(b)(1)(iii) where party responded to offer by seeking to clarify parameters for continued negotiations and finding course of conduct to be reasonable in the specific context of the negotiations of the parties).

⁹⁹ See Smith Speech ("National Association of Broadcasters president Gordon Smith put the blame on AT&T (DirecTV) and Dish Network for recent retransmission consent impasses with CBS, Nexstar Media Group (AT&T) and Meredith (Dish) TV stations, suggesting the timing of their failure to reach new agreements was part of a campaign to get Congress to renew STELAR and add some new retrans reforms.").

which “a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith.”¹⁰⁰ But the Commission’s totality of the circumstances test is not intended “to serve as a ‘back door’ inquiry into the substantive terms negotiated between the parties.”¹⁰¹ Rather, the Commission will only entertain complaints under the totality of the circumstances test “alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster’s good faith negotiation obligation.”¹⁰² “[C]omplaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed.”¹⁰³

The Complaint falls squarely within this dismissal category. As explained in Section III.A.1 above, Defendants, through their common agent, have engaged substantively and persistently with Complainants throughout the entire course of their RTC negotiations, just as they did in 2016. Complainants may be unnerved by the effectiveness of Defendants’ common agent approach, but this does not move “commonplace disagreements” into the realm of “outrageous” conduct, particularly where Complainants previously engaged in this very same joint negotiation process with the same common agent in 2016.

In its long history of resolving RTC disputes, the Commission has rejected complainants’ proffered theories of bad faith under the totality of the circumstances test on every occasion

¹⁰⁰ 47 C.F.R. § 76.65(b)(2); *see also* Compl. ¶¶ 66–77.

¹⁰¹ *Good Faith Order* at 5458 (¶ 32).

¹⁰² *Id.*

¹⁰³ *Id.*

except one.¹⁰⁴ In the single instance in which the Commission found such a violation of the good faith negotiation requirement, it was the *MVPD* that had run afoul of the good faith standard, not the broadcaster.¹⁰⁵ Taken together, this history shows that the Commission has consistently decided not to intervene in private RTC negotiations and to instead let the market work. Nothing in this proceeding indicates anything like the sort of “outrageous” behavior that might require the Commission to intervene in market negotiations, particularly where the Complainant is the MVPD with industry-leading market power trying to exert its enormous market power over nine small station groups, and where the Commission has declined to take action to find joint negotiations to be evidence of bad faith under the totality of the circumstances test.¹⁰⁶

Yet in support of their totality of the circumstances argument, Complainants contend that

Max Retrans **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

¹⁰⁴ See, e.g., *Coastal Tel. Broad.*, 2018 WL 5816554, at *4 (¶ 11) (finding no evidence of bad faith where MVPD “engaged in multiple back-and-forth discussions” with the broadcaster and “sought clarification of the parameters of the negotiation”); *ACC Licensee, Inc. v. Shentel Telecomm. Co.*, Memorandum Opinion and Order, 27 FCC Rcd. 7584 (2012) (rejecting broadcaster’s bad faith claim on the basis that the dispute at issue involved a disagreement over the appropriate valuation of the broadcaster’s station’s signal to a cable operator); *Mediacom Commc’ns Corp. v. Sinclair Broad. Grp., Inc.*, Memorandum Opinion and Order, 22 FCC Rcd. 35 (2007) (concluding that dispute between broadcaster and cable operator arose from a fundamental disagreement between the parties over the appropriate valuation of the broadcaster’s stations’ signals); *EchoStar Satellite Corp. v. Young Broad. et al.*, Memorandum Opinion and Order, 16 FCC Rcd. 15070 (2001) (rejecting satellite operator’s allegations that broadcaster breached good faith duty by refusing to negotiate, unreasonably delaying negotiations, engaging in “take-it-or-leave-it” bargaining tactics, and tying retransmission consent for its network-affiliated stations to carriage of two independent stations).

¹⁰⁵ See Letter from Steven Broecker, Deputy Chief, Policy Division, Media Bureau, FCC, to Jorge L. Bauermeister, Counsel for Choice Cable T.V., 22 FCC Rcd. 4933 (2007) (finding that cable operator’s failure to provide evidence of a valid RTC agreement permitting the cable operator to replace one broadcast signal with another constituted bad faith under the totality of the circumstances test).

¹⁰⁶ See *Implementation of Section 103 of the Stela Reauthorization Act of 2014, Totality of the Circumstances Test*, 30 FCC Rcd. at 10378–39 (¶ 14).

[END CONFIDENTIAL], and in so doing, violated the NDA from 2016.¹⁰⁷ These allegations, however, are plainly outside the scope of this proceeding. It has been well settled for the past nearly 70 years that the courts, and not the Commission, are the proper forum in which to adjudicate disputes arising out of privately negotiated contracts.¹⁰⁸ Having subsequently filed a lawsuit against Max Retrans in federal court that relies on the same allegations concerning the NDA as those in the Complaint, Complainants have effectively admitted that the courts are the more appropriate forum. If the Commission were to address the merits of the NDA while the federal court does so in parallel, this would create the risk of inconsistent rulings and would be a waste of scarce Commission administrative resources. Furthermore, Complainants' subsequent act of suing Max Retrans is an implicit acknowledgement that due process requires Max Retrans to have a fair opportunity to answer such allegations, which it cannot in this proceeding in which it is not a defendant. Indeed, by raising the allegations against Max Retrans to support its totality of the circumstances claim, Complainants seek to circumvent the Commission's lack of jurisdictional authority to bring a good faith complaint against Max Retrans, given that Max Retrans possesses no Commission licenses or authorizations of any kind. The Commission should not indulge such gamesmanship by Complainants.

Complainants' claims concerning [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] are all the more disingenuous in light of Complainants' own conduct.

During the course of the 2016 negotiations, [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

¹⁰⁷ Compl. at ii, ¶ 69.

¹⁰⁸ *Regents of Univ. Sys. of Ga. v. Carroll*, 338 U.S. 586 (1950) (holding that the Commission lacks authority under the Communications Act to adjudicate breach of contract claims).

[REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL].¹⁰⁹ This is *exactly* the same approach that Defendants proposed to take with respect to the 2019 negotiations. Complainants provide no explanation whatsoever as to why this approach evinces bad faith now but was perfectly acceptable back in 2016.

In addition, the Complaint asserts without any basis whatsoever that Defendants “appear[] to be managed and controlled” by Sinclair and that Defendants are trying to leverage their common shared services relationships with Sinclair [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END

CONFIDENTIAL].¹¹⁰ *First*, Complainants did not name Sinclair as a defendant in their Complaint. As a matter of fundamental due process, the Commission cannot adjudicate this allegation in a good faith complaint proceeding to which Sinclair is not a party. As such, the allegation is improperly raised here and should be disregarded by the Commission. *Second*, Complainants incoherently contradict their own allegations about Sinclair within the Complaint itself by affirmatively stating that each of the Defendants controls its own television licenses.¹¹¹ Setting aside the Complaint’s own internal inconsistencies, the Complaint has not even adequately alleged facts sufficient to prove the merits of its allegations.¹¹² Even if such

¹⁰⁹ Statement of Facts at 9; Ex. 2.

¹¹⁰ Compl. at i, ¶¶ 73–74.

¹¹¹ *See id.* ¶¶ 14–22 (alleging that all of the stations are either “own[ed] and control[led]” or “own[ed] and operate[d]” by Defendants).

¹¹² *Cf. Hicks Broad. of Indiana, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 13 FCC Rcd. 10662, 10677 (¶ 50) (1998) (“Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of *de facto* control.”).

allegations were true, they do nothing to support a totality of the circumstances argument of bad faith.

Finally, Complainants argue that Defendants' "continued recalcitrance" after termination of retransmission consent constitutes evidence of bad faith.¹¹³ That statement is false.

Defendants offered and agreed to [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] to accommodate the parties' ongoing negotiations. It was *Complainants* who sought to cut the negotiations short by removing Defendants' stations from their systems, after Max Retrans [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL].¹¹⁴ Notwithstanding Complainants' apparent desire to have the stations go dark on their MVPD systems, Defendants continue to negotiate in good faith with Complainants.¹¹⁵

IV. RESPONSES TO ALLEGATIONS

Defendants repeat and incorporate by reference the foregoing as though fully stated herein. The following responses are organized to track the sections and paragraphs of the Complaint. To the extent that an allegation in the Complaint is not expressly admitted or qualified, it shall be deemed denied in its entirety by Defendants.

SUMMARY

Defendants deny the allegations in the Summary.

¹¹³ Comp. ¶ 76.

¹¹⁴ ATT000714–ATT000716, ATT000723–ATT000724, ATT000727, ATT000836–ATT000837.

¹¹⁵ Lammers Decl.

INTRODUCTION

1. Defendants deny the allegations in Paragraph 1. For clarity, Defendants deny that they breached their obligation to negotiate with Complainants in good faith for the terms of retransmission of their stations' signals.

2. Defendants admit the allegations in Paragraph 2 with respect to the licensees identified therein. However, Complainants by their own admission do not list Deerfield Media, Inc. among the licensees of any of the stations in Paragraph 2. This is because Deerfield Media, Inc. does not own or control any broadcast stations or licenses, and was not involved in RTC negotiations with Complainants. Accordingly, Deerfield Media, Inc. is not properly named as a defendant in the Complaint, and should be dismissed from this proceeding.

3. To the extent the allegations of Paragraph 3 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents. The remaining allegations in Paragraph 3 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 3.

4. Defendants deny the allegations in Paragraph 4.

5. The allegations in Paragraph 5 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 5.

6. The allegations in Paragraph 6 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 6.

7. Defendants deny the allegations in Paragraph 7.

8. The allegations in Paragraph 8 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 8.

PUBLIC VERSION

9. Defendants deny that Complainants are entitled to any relief whatsoever, including that requested by Complainants in Paragraph 9. In particular, Complainants' request that the Commission compel Defendants to forego use of a common agent in order to satisfy their good faith negotiation obligation is inconsistent with Complainants' repeated acknowledgements, by word and by conduct, of the propriety of Max Retrans as Defendants' common agent.

10. Defendants deny that Complainants are entitled to any relief whatsoever, including that requested by Complainants in Paragraph 10.

JURISDICTION

11. The jurisdictional allegations in Paragraph 11 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 11.

THE COMPLAINANTS

12. Defendants are without knowledge or information sufficient to confirm or deny the number of DIRECTV subscribers referenced in Paragraph 12. The remaining allegations in Paragraph 12 state legal conclusions to which no response is required.

13. Defendants are without knowledge or information sufficient to confirm or deny the number of U-verse subscribers referenced in Paragraph 13. The remaining allegations in Paragraph 13 state legal conclusions to which no response is required.

THE DEFENDANTS

14. Defendants admit that Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; and Deerfield Media (San Antonio) Licensee, LLC own and control

the stations attributed to them in Paragraph 2. Deerfield Media, Inc. does not own or control any broadcast stations or licenses, and is not involved in RTC negotiations. Accordingly, Deerfield Media, Inc. is not properly named as a defendant in the Complaint, and should be dismissed from this proceeding. The remaining allegations in Paragraph 14 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 14.

15. Defendants admit that GoCom owns and operates the stations attributed to it in Paragraph 2. The remaining allegations in Paragraph 15 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 15.

16. Defendants admit that the HSH entities own and control the stations attributed to them in Paragraph 2. The remaining allegations in Paragraph 16 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 16.

17. Defendants admit that Mercury owns and controls the station attributed to it in Paragraph 2. The remaining allegations in Paragraph 17 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 17.

18. Defendants admit that the MPS entities own and control the stations attributed to them in Paragraph 2. The remaining allegations in Paragraph 18 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 18.

19. Defendants admit that Nashville License Holdings owns and controls the station attributed to it in Paragraph 2. The remaining allegations in Paragraph 19 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 19.

20. Defendants admit that Roberts owns and controls the station attributed to it in Paragraph 2. The remaining allegations in Paragraph 20 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 20.

21. Defendants admit that Second Generation owns and controls the station attributed to it in Paragraph 2. The remaining allegations in Paragraph 21 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 21.

22. Defendants admit that Waitt owns and controls the station attributed to it in Paragraph 2. The remaining allegations in Paragraph 22 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 22.

23. The allegations in Paragraph 23 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 23.

24. The allegations in Paragraph 24 are outside the scope of this proceeding. On this basis, Defendants deny the allegations in Paragraph 24.

PUBLIC VERSION

25. The allegations in Paragraph 25 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 25.

26. The allegations in Paragraph 26 are outside the scope of this proceeding. On this basis, Defendants deny the allegations in Paragraph 26.

STATEMENT OF FACTS

27. To the extent the allegations of Paragraph 27 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents.

28. To the extent the allegations of Paragraph 28 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents. The remaining allegations in Paragraph 28 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 28.

29. Defendants admit that they engaged Max Retrains to serve as their common agent in negotiations with Complainants and that Max Retrains entered into a non-disclosure agreement in 2016. To the extent the allegations of Paragraph 29 seek to characterize the contents of that written document, the document speaks for itself and Defendants deny the allegations to the extent that they are inconsistent with that document. The remaining allegations in Paragraph 29 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 29.

30. Defendants admit the allegations in Paragraph 30.

31. Defendants admit the allegations in Paragraph 31.

32. Defendants deny Complainants' characterization of the renewal agreements proposed for [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Defendants as "complete." Defendants admit the remainder the allegations in Paragraph 32.

33. To the extent the allegations of Paragraph 33 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents.

34. Defendants admit that negotiators for Complainants followed up on prior Defendant-specific agreement proposals they sent to Mr. Lammers. Defendants deny Complainants' characterization of these negotiators' actions as "diligent," and Defendants also deny any inference or suggestion by Complainants that a response to such proposals was necessary in light of Max Retrans's joint representation of Defendants. To the extent a further response is required, Defendants deny the remaining allegations in Paragraph 34.

35. Defendants deny Complainants' characterization of the rationale for their agreement to [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL]. Defendants admit the remainder of the allegations in Paragraph 35.

36. Defendants admit that Mr. Lammers provided Complainants with a mark-up of Complainants' proposed [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] agreement on behalf of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Defendants. Defendants deny any inference or suggestion by Complainants that Mr. Lammers intended this mark-up to be for [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] only, or that a response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's joint

representation of Defendants. To the extent a further response is required, Defendants deny the remaining allegations in Paragraph 36.

37. Defendants admit that Complainants sent new Defendant-specific agreement proposals to Mr. Lammers in April 2019, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]. Defendants deny Complainants' characterization of their actions as "accommodations" or of Max Retrans's willingness to negotiate with Complainants. Defendants also deny any inference or suggestion by Complainants that a response to such proposals was necessary in light of Max Retrans's joint representation of Defendants. To the extent a further response is required, Defendants deny the remaining allegations in Paragraph 37.

38. Defendants admit that Mr. Lammers provided Complainants with a mark-up of Complainants' proposed [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] agreement on behalf of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Defendants on April 25, 2019. Defendants deny Complainants' characterization of Max Retrans's willingness to negotiate with Complainants and deny any inference or suggestion by Complainants that a response to Complainants' Defendant-specific agreement proposals was necessary in light of Max Retrans's joint representation of Defendants. To the extent a further response is required, Defendants deny the remaining allegations in Paragraph 38.

39. Defendants deny the allegations in Paragraph 39. On May 8, 2019, Max Retrans [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL]. Separately, and

more relevantly, Complainants agreed to [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]. Further, Defendants deny Complainants' characterization of Max Retrans's willingness to negotiate with Complainants.

40. The allegations in Paragraph 40 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 40. Further, to the extent the allegations of Paragraph 40 seek to characterize the contents of a written document, the document speaks for itself and Defendants deny the allegations to the extent that they are inconsistent with that document.

41. To the extent the allegations of Paragraph 41 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents.

42. Defendants admit that Mr. Lammers advised Ms. Kim that it would be a waste of time to involve [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] lawyers in Defendants' RTC negotiations unless and until Complainants agreed to Max Retrans's joint representation of Defendants. Defendants deny the remainder of the allegations in Paragraph 42.

43. The allegations in Paragraph 43 are outside the scope of this proceeding. On this basis, Defendants deny those remaining allegations.

44. To the extent the allegations of Paragraph 44 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents. The remaining allegations in

Paragraph 44 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 44.

45. Defendants deny the allegations in Paragraph 45. For clarity, Mr. Lammers has consistently advised Complainants throughout Defendants' RTC negotiations that Max Retrans served as Defendants' joint agent.

46. To the extent the allegations of Paragraph 46 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents.

47. Defendants admit that Complainants' right to retransmit the signals for all of Defendants' stations expired on the dates set forth in Paragraph 47. Defendants deny the remainder of the allegations in Paragraph 47, including Complainants' characterization of their, Defendants, and Max Retrans's actions and any inference or suggestion by Complainants that a response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's joint representation of Defendants.

48. Defendants admit that Mr. Lammers sent Complainants mark-ups of the Defendant-specific agreement proposals on June 3, 2019. To the extent the allegations of Paragraph 48 seek to characterize the contents of those written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents. Defendants deny Complainants' characterization of the completeness of the Defendant-specific mark-ups, and Defendants further deny any inference or suggestion by Complainants that a response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's joint representation of Defendants.

49. To the extent the allegations of Paragraph 49 seek to characterize the contents of written documents, the documents speak for themselves and Defendants deny the allegations to the extent that they are inconsistent with those documents. Defendants deny any inference or suggestion by Complainants that a response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's joint representation of Defendants.

50. The allegations in Paragraph 50 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 50.

51. The allegations in Paragraph 51 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 51.

COUNT I — PER SE VIOLATIONS

52. Defendants repeat and incorporate their responses to all of the preceding allegations within Paragraphs 1-51 as if set forth fully in their response to Paragraph 52.

53. The remaining allegations in Paragraph 53 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 53.

54. The allegations in Paragraph 54 constitute statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. For clarity, Defendants note that Complainants are also required to negotiate retransmission consent in good faith.

55. Paragraph 55 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. The remaining allegations in Paragraph 55 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 55.

56. Paragraph 56 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. The remaining allegations in Paragraph 56 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 56.

57. Paragraph 57 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. The remaining allegations in Paragraph 57 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 57.

58. Defendants deny the allegations in Paragraph 58.

59. Paragraph 59 is a statement of law to which no response is required.

60. The allegations in Paragraph 60 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 60. For clarity, Defendants deny Complainants' characterization of the willingness of Defendants or Max Retrans to negotiate, and Defendants also deny any inference or suggestion by Complainants that a response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's joint representation of Defendants.

61. Paragraph 61 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. The remaining allegations in Paragraph 61 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 61. For clarity, Defendants deny Complainants' characterization of the willingness of Defendants or Max Retrans to negotiate, and Defendants also deny any inference or suggestion by Complainants that a response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's joint representation of Defendants.

62. Paragraph 62 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. The remaining allegations in Paragraph 62 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 62.

63. Paragraph 63 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding.

64. The allegations in Paragraph 64 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 64.

65. The allegations in Paragraph 65 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 65.

COUNT II — TOTALITY OF THE CIRCUMSTANCES

66. Defendants repeat and incorporate their responses to all of the preceding allegations within Paragraphs 1-65 as if set forth fully in their response to Paragraph 66.

67. Paragraph 67 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. The remaining allegations in Paragraph 67 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 67.

68. The allegations in Paragraph 68 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 68.

69. The allegations in Paragraph 69 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 69.

70. The allegations in Paragraph 70 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 70.

71. Paragraph 71 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding.

PUBLIC VERSION

72. The allegations in Paragraph 72 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 72.

73. The allegations in Paragraph 73 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 73.

74. The allegations in Paragraph 74 state legal conclusions to which no response is required and are outside the scope of this proceeding. On these bases, Defendants deny the allegations in Paragraph 74.

75. Defendants deny the allegations in Paragraph 75.

76. Paragraph 76 contains statements of law to which no response is required. Defendants deny Complainants' characterization of such statements of law as they may apply to this proceeding. Defendants deny the remainder of the allegations in Paragraph 76.

77. The allegations in Paragraph 77 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the remaining allegations in Paragraph 77.

REQUEST FOR RELIEF

Defendants deny that Complainants are entitled to any relief whatsoever, including that requested by Complainants in the Request for Relief. In particular, Complainants' request that the Commission compel Defendants to forego use of a common agent in order to satisfy their good faith negotiation obligation is inconsistent with Complainants' repeated acknowledgements, by word and by conduct, of the propriety of Max Retrans as Defendants' common agent.

REQUEST FOR EXPEDITED TREATMENT

Defendants deny that Complainants are entitled to any relief whatsoever, including that requested by Complainants in the Request for Expedited Treatment.

AFFIRMATIVE DEFENSES

1. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

Complainants' claims are barred because they fail to state a claim upon which relief can be granted. The Complaint fails to present any evidence that establishes or even suggests that Defendants violated their duty to negotiate in good faith under 47 CFR § 76.65. The Commission's regulations expressly allow "[c]oordination of [retransmission consent] negotiations or negotiation on a joint basis by two or more television broadcast stations" provided those stations are not "in the same local market."¹¹⁶ Such permissible joint negotiations are not a "joint refusal to negotiate" individually as the Complaint alleges.¹¹⁷ Defendants did in fact jointly negotiate via their common agent in the months leading up to the filing of the Complaint, in the same manner and using the same common agent as they previously did in 2016. Furthermore, the Complaint's primary claims regarding the alleged refusal to negotiate rest on claims against a non-party to this proceeding, Max Retrans, and relate to an NDA that [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹⁶ 47 C.F.R. § 76.65(b)(1)(viii).

¹¹⁷ Compl. ¶ 6.

¹¹⁸ ATT000844.

[END

CONFIDENTIAL]. None of the Complaint’s allegations regarding joint negotiations establish a violation of the duty of good faith.

2. The Complaint Is Time-Barred. Under 47 C.F.R. § 76.65(e), good faith complaints must be filed in relevant part within one year of the date that a:

television broadcast station or multichannel video programming distributor engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, *and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station or multichannel video programming distributor*[.]¹¹⁹

The intent of this section is to ensure that complainants “do not sit on grievances and that they bring good faith complaints in a timely manner.”¹²⁰ Here, the existing agreements between the parties that were subject to renegotiation date back to 2016, when Defendants jointly negotiated them using the same process and the same common agent. Ultimately, Complainants’ core allegations regarding the 2019 renegotiations are simply attacks on the joint negotiation strategy and related agreements that began in 2016. For example, **[BEGIN CONFIDENTIAL]**

¹¹⁹ 47 C.F.R. § 76.65(e)(2) (emphasis added). Section 76.65(e)(1) does not apply because Complainants have not alleged that they entered into an RTC agreement that violates one or more of the Commission’s rules. Section 76.65(e)(3) does not apply because Complainants did not notify a television broadcast station or multichannel video programming distributor of their intent to file a complaint based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the Commission’s rules. Rather, Complainants threatened non-party Max Retrans with litigation related to alleged NDA violations. *See* Compl. ¶ 7.

¹²⁰ *Implementation of the Satellite Home Viewer Improvement Act of 1999*, Order on Reconsideration, 16 FCC Rcd. 15599, 15603 (¶ 10) (2001) (further noting that an MVPD may not use renewal negotiations to raise good faith allegations related to the previous negotiations and contracts).

[REDACTED]
[REDACTED] [END CONFIDENTIAL].¹²¹ Complainants also
accuse Defendants of [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]

[REDACTED] [END CONFIDENTIAL] even though that is the same joint negotiation strategy
that in 2016 successfully resulted in the very RTC agreements and the service to customers that
Complainants now accuse Defendants of interrupting. Similarly, Complainants accuse
Defendants of violations related to [BEGIN CONFIDENTIAL] [REDACTED]
[END CONFIDENTIAL], [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].¹²³ Although the Commission has indicated
that new renewal or extension negotiations can commence a new one-year complaint period,¹²⁴
the practices and joint negotiation strategies that the Complaint now challenges are identical to
and began with the 2016 negotiations. In other words, Complainants do not allege good faith
violations related to some *new* negotiation action or process unique to 2019, but rather with
respect to the overall joint negotiation and common agent used by Defendants since 2016. If
Complainants truly believed such joint negotiation strategies were in violation of the
Commission's rules, they should have timely challenged them as part of the 2016 negotiations
rather than "sit on their grievances" and then attempt to undo that same joint negotiation
approach in the subsequent 2019 negotiations. In short, if Complainants believed the 2016 joint

¹²¹ Compl. ¶ 50.

¹²² *Id.* ¶ 75.

¹²³ Statement of Facts at 9; Ex. 2.

¹²⁴ *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 16 FCC Rcd. at 15603 (¶ 10).

negotiations and resulting agreements violated the Commission's rules, they should have said so then. Instead, Complainants waived those arguments, and the Complaint is time barred.

3. Complainants Are Equitably Estopped from Challenging Defendants' Joint Representation Arrangement. Complainants are equitably estopped from arguing that Defendants' use of a common agent in connection with the 2019 RTC negotiations violates the good faith obligation. "To prove a claim of equitable estoppel, the aggrieved party must show that he justifiably relied upon the conduct of the party sought to be estopped, changed his position in reliance, and will suffer injury unless the adversary is estopped from repudiating the prior inconsistent conduct."¹²⁵ All three of these criteria are met here. Although Complainants initially resisted Max Retrans's joint representation of Defendants in the 2016 negotiations,

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL].¹²⁶ Thus, when it came time to renew negotiations in 2019, Defendants justifiably relied on Complainants' agreement to deal with Defendants jointly and collectively in 2016, as well as the structure of those negotiations. Defendants changed material aspects of their 2019 negotiating strategy based on this reliance: [BEGIN HIGHLY

CONFIDENTIAL] [REDACTED]

¹²⁵ *Communique Telecomm., Inc. d/b/a Logically Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau*, Memorandum Opinion and Order, 14 FCC Rcd. 13635, 13651 (¶ 29) (1999).

¹²⁶ Statement of Facts at 9; Ex. 2.

[END

HIGHLY CONFIDENTIAL]. Finally, Defendants have already suffered — and will continue to suffer — substantial injury as a result of Complainants’ about face. The longer Complainants refuse to negotiate with Defendants collectively — which, as explained above, is wholly permitted under Commission rules — the longer Defendants’ stations’ signals will remain off of Complainants’ systems, which negatively impacts Defendants’ reputation and deprives Defendants of significant revenue and fees.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Commission deny or, in the alternative, dismiss the Complaint in its entirety, with prejudice, and award Defendants the reasonable costs and attorneys’ fees they incurred in defending against the Complaint.¹²⁷

¹²⁷ On a status call with Defendants’ counsel and the Commission on July 10, 2019, Complainants’ counsel raised the possibility that Complainants may seek discovery against Defendants in this dispute. Given that the Complaint is deficient on its face, however, no such further proceedings are warranted. *See IT&E Overseas, Inc. v. Micronesian Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd. 16058 (¶ 20) (1998) (“The Commission’s rules and policies never intended that the discovery process in a complaint proceeding be used as a ‘fishing expedition’ or as the primary means to determine if a claim exists. Where . . . a complainant has failed to allege any specific facts necessary to prove its claim, it would be contrary to Commission precedent to permit the complainant to use extraordinary measures to bolster its claim.” (footnote omitted)). For similar reasons, the Commission has also declined to make discovery as-of-right in RTC complaint proceedings, holding that because “MVPDs will be present at negotiations, we generally anticipate that evidence of a violation of the good faith standard will be accessible by the MVPD complainant.” *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd. 5445, 5479 (¶ 79) (2000). In this proceeding, Complainants were directly involved in both the 2016 and 2019 negotiations and have not alleged that they lack access to necessary information in support of their claims. To the contrary, the Complaint acknowledges that it is based on various existing RTC agreements, drafts of proposals, and emails between Complainants and the joint agent, as well as the “personal knowledge” of Complainants’ negotiators, who provided supporting declarations. Compl. at 3 n.8 & n.10. Complainants further assert that the “pertinent terms and details necessary to the Commission’s decision are described or quoted [in the Complaint].” *Id.*

Dated: August 6, 2019

Respectfully submitted,



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at 3 n.8. Accordingly, there is no basis for discovery by Complainants, which would at best be a fishing expedition into matters not germane to the Complaint and underlying negotiations. Moreover, discovery by Complainants would needlessly delay this proceeding, in conflict with Complainants' requests for urgent and expedited treatment of these matters.

PUBLIC VERSION

DECLARATION OF DUANE A. LAMMERS

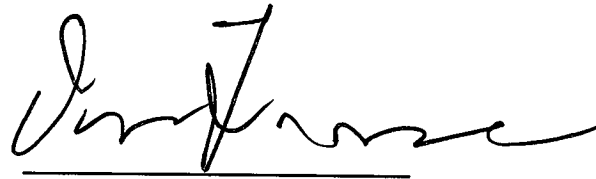
I, Duane A. Lammers, am over the age of 18. I am a resident of the state of Missouri. I have personal knowledge of the facts herein, and, if called as a witness, could competently testify thereto.

1. I am President of Max Retrans LLC. In that role, I routinely participate in retransmission consent negotiations with multichannel video programming distributors on behalf of broadcast station groups across the country. In particular, I have been personally involved on behalf of Defendants in the negotiations that are the subject of this good faith complaint proceeding.
2. I have reviewed the DIRECTV, LLC and AT&T Services Inc. HCI-redacted Complaint. Based on my personal knowledge and direct involvement, the facts set forth in the Answer followed by a reference to this declaration are true and correct. Moreover, based on my personal knowledge and direct involvement, the remainder of the Statement of Facts related to my role as common agent for Defendants is true and correct, as well.

PUBLIC VERSION

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 6, 2019 in Missouri.

A handwritten signature in black ink, appearing to read 'Duane A. Lammers', written over a horizontal line.

Duane A. Lammers

PUBLIC VERSION

DECLARATION OF STEPHEN P. MUMBLOW

I, Stephen P. MumbLOW, am over the age of 18. I am a resident of the state of Massachusetts. I have personal knowledge of the facts herein, and, if called as a witness, could competently testify thereto.

1. I am President and ultimate owner of Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; Deerfield Media (Reno) Licensee, LLC; Deerfield Media (Baltimore) Licensee, LLC; and Manhan Media, Inc. In that role, I own and operate broadcast television stations in various markets across the country.
2. I have reviewed the DIRECTV, LLC and AT&T Services Inc. HCI-redacted Complaint. Based on my personal knowledge, each statement in this Answer followed by a reference to this declaration is true and correct. Moreover, based on information made known to me pursuant to my duties, the remainder of the Statement of Facts is true and correct as well.

PUBLIC VERSION

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 6, 2019 in Massachusetts.



Stephen P. Mumblow

PUBLIC VERSION

DECLARATION OF ARMSTRONG WILLIAMS

I, Armstrong Williams, am over the age of 18. I am a resident of the District of Columbia. I have personal knowledge of the facts herein, and, if called as a witness, could competently testify thereto.

1. I am the owner and Manager of Howard Stirk Holdings, LLC, HSH Flint (WEYI) Licensee, LLC and HSH Myrtle Beach (WWMB) Licensee, LLC. In that capacity, I own and operate broadcast television stations in various markets across the country.
2. I have reviewed the DIRECTV, LLC and AT&T Services, Inc. HCI-redacted Complaint. Based on my personal knowledge, each statement in this Answer followed by a reference to this declaration is true and correct. Moreover, based on information made known to me pursuant to my duties, the remainder of the Statement of Facts is true and correct as well.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 6, 2019 in Washington, D.C.

A handwritten signature in black ink, appearing to read "Armstrong Williams", is written over a horizontal line.

Armstrong Williams

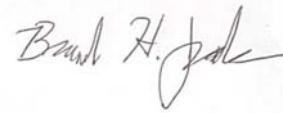
PUBLIC VERSION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2019, a true and correct copy of the foregoing Defendants' Answer to Good Faith Complaint was submitted electronically to the Federal Communications Commission and served via electronic mail upon the following:

Sean A. Lev
Kevin J. Miller
Matthew M. Duffy
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036

Counsel for Complainants

A handwritten signature in black ink, appearing to read "Brandon H. Johnson", is positioned above a horizontal line.

Brandon H. Johnson

Exhibits

PUBLIC VERSION
Defendants' Exhibit List
MB Docket No. 19-168
DIRECTV, LLC et al v. Deerfield Media, Inc., et al.
(August 6, 2019)

Exhibit Number	Date	Description
1		
2		
3		
4		
5		
6		
7		
8		

Exhibit 1

**Highly Confidential Information
Redacted**

Exhibit 2

**Highly Confidential Information
Redacted**

Exhibit 3

**Highly Confidential Information
Redacted**

Exhibit 4

**Highly Confidential Information
Redacted**

Exhibit 5

**Highly Confidential Information
Redacted**

Exhibit 6

**Highly Confidential Information
Redacted**

Exhibit 7

**Highly Confidential Information
Redacted**

Exhibit 8

**Highly Confidential Information
Redacted**